Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHAEL RICHARDS
Petitioner,

v.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY,
Respondents.

On Petition For Writ of Certiorari
To The Texas 10th Circuit Court of Appeals

APPENDIX VOLUME I

Gaines West
Counsel of Record
WEST, WEBB, ALLBRITTON & GENTRY, P.C.
1515 Emerald Plaza
College Station, Texas 77845-1515
(979) 694-7000 - Telephone
(979) 694-8000 - Facsimile
Counsel for Petitioner.

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

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APPENDIX A

CAUSE NO. 47,822-361 Filed Mar 2, 2001

MICHAEL RICHARDS, Plaintiff,	§	IN THE DISTRICT COURT OF
V.	§	BRAZOS COUNTY, TEXAS
TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY, Defendants.	§	361ST JUDICIAL DISTRICT

SUPPLEMENTARY BRIEF TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Michael Richards (hereinafter referred to as "Plaintiff"), Plaintiff in the above referenced case, and files this, his Supplementary Brief to Plaintiff's Response to Defendants' Motion to Dismiss for Lack of Jurisdiction. In support hereof, Plaintiff respectfully would show the following to the Court:

I.
SUMMARY OF ARGUMENT

Texas A & M University, a member institution of The

Texas A & M University System, and The Texas A & M University System (collectively "TAMUS") are state agencies and do not enjoy sovereign immunity protection for acts of retaliation under Chapter 501 of the Texas Labor Code. Defendants would deprive TAMUS employees of a protection afforded to most other state employees. If Chapter 502 does not waive sovereign immunity as to TAMUS, then it is unconstitutional in that it violates the equal protection of law provisions of the U.S. Constitution and Texas Constitution by depriving the Plaintiff of a protected property interest whereas other similarly situated employees cannot be deprived of the same interest. In addition, if Chapter 502 does not waive sovereign immunity to TAMUS, it is unconstitutional as it applies to state employees because it effectively abrogates their right to bring an anti-retaliation cause of action, in violation of the "open courts" provision of the Texas Constitution. Further, any other legislative remedy is foreclosed which results in the Plaintiff having to rely on this Court for affirmative relief.

II.
ARGUMENTS AND AUTHORITIES

The Texas Supreme Court, in *Fernandez v. Kerrville State Hospital*, 28 S.W.3d 1 (Tex. 2000), held that sovereign immunity for state agencies has been waived under the 1989 version of Chapter 451 of the Texas Labor Code, the State's Anti-Retaliation Law. Courts addressing the issue of sovereign immunity have consistently held that a branch of university system is a state agency. *Carrillo v. Texas Tech University Health Sciences Center*, 960 S.W.2d 870 (Tex.App.-El Paso 1997); *Honhorst v. University of North Texas*, 983 S.W.2d 872 (Tex.App.-Fort Worth, 1998);

Southwest Texas State University v. Enriquez, 971 S.W.2d 684 (Tex.App.-Austin, 1998). Chapter 501 of the Labor Code defines a state agency to be an institution. It is therefore axiomatic that the Legislature could not have intended that Chapter 502 of the Labor Code be used to deprive employees of TAMUS (or the UT System under Chapter 503 of the Labor Code) of a right enjoyed by all other state and private employees, including, for instance, and without limitation, employees of Texas Tech University, University of North Texas, and Southwest Texas State University. It can only make sense, and be appropriately fair and equal, that the Legislature intended that all state agencies, including TAMUS and its member institutions, waive sovereign immunity for acts of retaliation, or conversely stated, it cannot have been the intent of the Legislature to protect one group of state employees from retaliation and not another group of employees, who are similarly situated.

III.
EQUAL PROTECTION

Otherwise, assuming the Legislature intended to waive sovereign immunity for state employees, except those at TAMUS, then Chapter 502, along with Chapter 501.024(8)[1] of the Texas Labor Code is un constitutional in that it violates the equal protection of the law provisions of the Fourteenth Amendment to the U.S. Constitution and Texas Constitution Article I § 3. The Legislature has the power to waive sovereign immunity or not to waive sovereign immunity for agencies of the State. *Clark v. University*

---

[1]Section 501.024(8) expressly excludes TAMUS employees from the provisions of Chapter 501.

of Texas Health Science Center at Houston, 919 S.W.2d 185 (Tex.App.-Eastland, 1996, writ denied). In *Clark*, the Eastland Court of Appeals held that because the University of Texas System employee could not identify any express agreement or statute which protected her from being discharged without a hearing, they could not engage in an equal protection analysis. *See Id.* at 188. Here the *Clark* holding is easily distinguished and thus inapplicable to this case for the reason that the Plaintiff herein was afforded protection from arbitrary discharge. Under TAMUS Policies an employee can only be discharged for adequate cause. TAMUS Policy 32.02.02 ¶¶ 2,3. (Exhibit "A") Thus, the Plaintiff had a property interest in his employment and, unlike *Clark*, an equal protection analysis must be made.

The Fourteenth Amendment to the United States Constitution provides that"[n]o State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. Similarly, the Texas Constitution provides that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. ART I § 3. Under a rational basis equal protection test, similarly situated individuals must be treated equally under statutory classification unless there is "some legitimate articulated state purpose" for not doing so. *McGinnis v. Royster*, 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, (1973). Thus, the standard by which equal protection claims are reviewed is whether establishment of disparate treatment for different classes is rationally related to goals the legislature sought to achieve by enacting the legislation, *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985).

Depriving TAMUS employees from the general waiver of sovereign immunity embodied in Chapter 501 of the Texas Labor Code denies them the equal protection of the laws as required by the Fourteenth Amendment to the United States Constitution and by article I, § 3 of the Texas Constitution. Chapter 502 (and 501.024(8)), which retains sovereign immunity for TAMUS, clearly ereates different classes of state employees that are treated differently under the law. By waiving sovereign immunity for most state employees to be able to complain about retaliation for filing workers compensation claims, the Legislature is constitutionally required to waive sovereign immunity as to TAMUS employees, or be in violation of the equal protection provisions referenced herein above.

IV.
OPEN COURTS PROVISION

In addition, the Texas Constitution provides that "all courts shall be open, and every person for injury done to him, in his lands, goods, person or reputation shall have remedy by due course of law." TEX. CONST. ART. 1, § 13. While the "open courts" provision does not restrict the Legislature's freedom to substantively modify or abrogate purely statutory causes of action, the Legislature may not unreasonably impede a party's access to court to assert a cause of action it has created. *See Central Appraisal District of Rockwall County v. Lall*, 924 S.W.2d 686 (Tex. 1995). When considering whether the Legislature has unreasonably impeded access to courts in violation of the open courts provision, it does not matter whether the claim which is being impeded arises through statute or common law. ld. The Defendants' assertion that sovereign immunity under Chapter 502 denies

access to the courts to TAMUS employees violates the open courts provision.

Sovereign immunity is a common law doctrine in that it preceded the current Texas Constitution. *Green International, Inc. v. State*, 877 S.W.2d 428 (Tex.App.-Austin, 1994). The open courts provision must be read in light of the pre-existing concept of sovereign immunity. *Id.* In *Green*, the Austin Third Court of Appeals found no authority holding that the open courts provision was intended to abolish or limit sovereign immunity, *Id.* The Appellant in Green was asking the court to waive sovereign immunity in an instance not contemplated by the Legislature. The Green case can be distinguished from the ease at bar in that the Plaintiffis not asking this Court to waive sovereign immunity where the Legislature has not already specifically intended waiver. This waiver has already been recognized by the Texas Supreme Court in *Fernandez*. The Plaintiff asks only to be afforded the same access to the courts enjoyed by all other state agency employees and thus, avail himself of his right to the open courts of this State.

V.

LEGISLATIVE REMEDY IS FORECLOSED

Concerning Mr. Richards' potential remedy in seeking a Legislative Waiver of Sovereign Immunity against the Defendants, the undersigned sent the attached letters (Exhibits "B" and "C") to State Senator Steve Ogden and State Representative Fred Brown, respectively. Senator Ogden's Senior Staff Aide, Kevin Heybum, communicated that Senator Ogden declined to introduce such legislation on behalf of the Plaintiff, and Representative Brown's office has not returned a follow up call placed to them. On my initial inquiry to Representative Brown's office, Melissa Nicholas,

Mr. Brown's aide, related that Mr. Brown most likely would not introduce such legislation and unless I received a call back from their office I should assume that Representative Brown would not introduce such legislation. By late afternoon on Friday, March 2, 2001, no calls were received from Representative Brown, and no intervention by him is expected based on the representation made by his staff aide. The Plaintiff believes that the Defendants represent such a large part of the support base for both Senator Ogden and Representative Brown that sponsoring such legislatio n would likely pose a risk to such support and result in their reluctance to file claims to waive sovereign immunity for an individual situated as is the Plaintiff. In fact, neither Senator Ogden nor Representative Brown have agreed to sponsor such an individualized legislative remedy, and as a result the Plaintiff has only to rely on this Court for any relief.

WHEREFORE PREMISES CONSIDERED, Plaintiff, Michael Richards, prays that this Court deny Defendants' Motion to Dismiss for Lack of Jurisdiction, and for all such other relief to which he may be justly entitled.

Respectfully submitted,
WEST, WEBB, ALLBRITTON,
GENTRY & RIFE, P.C.
By: /s/ Gaines West
Gaines West
State Bar No. 24028727
C. Scott Settle
STATE BAR NO. 24028727
1515 Emerald Plaza
College Station, Texas 77845-1515
(979) 694-7000 - Telephone
(979) 694-8000 - Facsimile

ATTORNEY FOR PLAINTIFF,
MICHAEL RICHARDS

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document has been delivered by facsimile and regular first class mail to counsel listed below on this 2nd day of March, 2001.

Shannon L. Simmons
Assistant Attorney General
Tort Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ Gaines West
Gaines West

SYSTEM REGULATIONS

32.02.02 Discipline and Dismissal Procedure for Nonfaculty Employees

November 4, 1997

Revised September 18, 2000

Supplements System Policy 32. 02

1. GENERAL

1.1 Basic Principles

1.1.1 This System regulation is based on the principle of progressive discipline. A System employee whose conduct or job performance is not consistent with accepted standards, and whose conduct or job performance does not warrant dismissal as discussed later in this regulation, will be notified that the conduct or job performance is inappropriate or unacceptable and be given a reasonable time to correct those deficiencies. With progressive discipline, an employee faces increasingly stricter disciplinary measures if satisfactory improvement does not occur after the disciplinary process is initiated.

1.1.2 This process applies to nonfaculty employees of the System, including agency employees wi,th faculty titles who are not in tenure track positions. This

process does not apply to graduate assistants, probationary (see Regulation 33.99.02), temporary or wage employees. These employees may be dismissed at any time for any reason. A wage employee is an employee who is hired on a temporary basis for less than four and one-half months during a fiscal year and/or at less than 50 percent effort. Student workers are also wage employees if student status is a condition of employment. Wage employees do not occupy a line item in the budget and are paid biweekly on the wages payroll. Wage employees are not eligible for employee benefits, including retirement group insurance, paid vacation, paid sick leave and paid holidays. However, if a regular employee is transferred to wages to train his/her replacement, he/she may maintain his/her benefits.

1.1.3 The System specifically retains the right to dismiss an employee without any requirement to pursue progressive disciplinary procedures when it is determined that the employee's conduct or job performance warrants immediate dismissal: In addition, not every step must be taken in each case. The supervisor and department head will agree on the appropriate steps based on each situation.EXHIBIT A

1.1.4 This regulation is for guidance purposes only and is specifically not intended to create any right to notice and opportunity for a hearing beyond that mandated by state and federal laws. Failure to follow procedures as outlined in this regulation will not create claims based on failure to meet standards of procedural due process beyond those mandated by state and

federal laws. No claifias asserting procedural due process rights exceeding those mandated by state and federal law will be subject to mediation. Failure by the System or a System component to follow the procedural steps outlined in this regulation will not form the basis of any employee's appeal of termination.

1.1.5 The discipline and dismissal process includes procedural steps that may need to be modified to provide a fair and workable process for employees stationed away from the System component's headquarters. The Chief Executive Officer (CEO) of each System component is authorized to modify these procedures when required by the organizational structure or the geographical dispers!on of employees of the component. These modified procedures must conform m pnnclple with the procedures outlined in this regulation and be documented by a component rule.

1.2 Heads of departments or similar administrative units are responsible for their employees being informed of the rules and regulations to be followed, the standards of conduct to be met, and the job performance to be achieved. Employees are expected to fully acquaint themselves With the rules, procedures, and standards of conduct and performance of their departments or units Employees who do not assume the responsibilities set out by these rules, procedures, and standards may be subject to disciplinary actions.

2. GROUNDS FOR DISCIPLINARY ACTION OR DISMISSAL

2.1 Nonfaculty employees of the System are subject to dis-

ciplinary action or dismissal under the procedures outlinbd herein if adequate cause is established.

2.2 Acts that may result in disciplinary action or dismissal include, but are not limited to" incompetence; inability to perform assigned duties in a satisfactory manner; misconduct; acts of dishonesty; moral turpitude; inappropriate usage or possession of firearms or any other prohibited weapons (as defined by See. 46.05 of the Texas Penal Code) on System property Without proper authority; threats of violence; neglect of assigned responsibilities; insubordination; absenteeism; inability to work with others where required; lack of sufficient skill necessary to complete job assignments; failure to abide by the rules and regulations of the System and its components; sexual harassment; refusal to cooperate or interference with an interna! investigation; failure to abide by state and federal statutes while on the job; commission, on or offthe job, of any illegal act under state and federal laws that could affect job performance; endangerment of the safety ofcoworkers; or similar behavior.

2.3 These acts can he either specifically enumerated acts (see 2.2) or general acts not enumerated herein that nevertheless are manifestations of professional irresponsibility, a lack of trustworthiness, a breach of trust, or a lack of personal or professional credibility with supervisors, coworkers, or others that seriously undermine or prohibit the employee's ability to function effectively in higher job.

3. BURDEN OF PROOF

3.1 The burden of proof is ion the employ!ng institution or agency to show adequate cause why the individual should

be disciplined or dismissed. It is the responsibility of the head of the department or similar administrative unit, or designee, to document the facts and inform the employee of the inappropriate job-related conduct or unacceptable job performance.

3.2 The employee will be given the opportunity to respond to the notice that the job-related conduct or job performance was inappropriate.

3.3 Copies of all documents pertaining to disciplinary action or dismissal will be filed in the official personnel file maintained for each employee by the System component. Access to such documents will be based on the provisions of the Texas Public Information Act. (See System Regulation 61.01.02.)

3.4 A System component CEO can require approval from a higher level than the departmental or unit approval levels required by this regulation.

4. PERSONAL CONFERENCES

4.1 When reason arises to question the job-related conduct or job performance of an employee, the appropriate supervisor will discuss the matter with the individual in a personal conference.

4.2 A written record ofth_ personal conference will be prepared and signed by the supervisor, and a copy will be given to the employee. An acknowledgment of receipt will be signed by the employee, and a copy of the written record and the signed acknowledgment will be placed in the employee's personnel file. If the employee refuses to

sign the record, a third party may be called in and asked to sign the record, witnessing that the employee has refused to sign. Alternatively, the record may be totaled to the address of record of the employee by certified mail or with a certificate of mailing, and the return receipt or certificate filed along with the written record. This record will state the performance or conduct problems discussed in the conference, the timing and nature of corrective measures to be taken by the employee, and any related agreements reached by the supervisor and employee.

4.3 On occasion, personal conferences may be conducted without preparing a written record for the employee's personnel files, since an informal notice may result in the desired changes in behavior. If the employee continues to have problems meeting conduct and/or job performance standards, the supervisor may prepare a written reprimand that references the past informal conferences.

4.4 If the undesirable conduct or performance continues after the personal conference(s), the supervisor will initiate further disciplinary action or dismissal procedures.

4.5 A conference held for an annual performance evaluation and the accompanying Written report of the evaluation may be considered part of the discipline and dismissal procedure.

5. WRITTEN REPRIMAND

5.1 When the supervisor determines that an employee has failed to respond to personal conference(s) or has committed an infraction of sufficient severity to warrant more severe disciplinary action, a written reprimand may be prepared and forwarded to the head of the department or

similar administrative unit (or next higher manager), or designee, fo approval. Upon approval by the head of the department or unit, the reprimand will be issued to the employee.

5.2 To achieve its intended purpose of resolving issues of job-related conduct or job performance of employees, the written reprimand will, as a minimum:

(1) state explicitly the inappropriate job-related conduct or unacceptable job performance of the Employee;

(2) describe any preVious efforts through personal conferences to make the employee aware of the need for a change in conduct or job performance pertinent to the situation or event;

(3) state precisely what corrective measures are expected, and within what time frame, if appropriate; and

(4) specify the adverse personnel actions the employee may expect to be taken.

5.3 Depending on the severity of the inappropriate job-related conduct or unacceptable job performance, the written reprimand may be the appropriate disciplinary action in circumstances including, but not limited to:

(1) continued inefficient, inaccurate, or unsafe work practices after personal conference(s);

(2) continued neglect of assigned duties or workplace rules or procedures after personal conference(s);

(3) damage or loss of System property;

(4) abuse of sick leave or other leaves of absence;

(5) insubordination; or

(6) other inappropriate job-related conduct or job performance that interferes with fulfilling job performance standards or the job performance of other personnel.

5.4 As part of the written reprimand, the employee may be placed on probation. If the employee fails to take the specified corrective measures within the specified probationary period, the employee may be terminated. The employee should be informed in writing that he or she is on probation and will be supervised more closely during that period.

6. TEMPORARY SUSPENSION WITHOUT PAY

6.1 An employee may be suspended without pay as a disciplinary measure for those causes that require more severe action than a written reprimand but are not considered sufficiently serious to warrant dismissal of the employee. Such suspension may also be appropriate if the action of the employee would normally be cause for termination, but mitigating circumstances are present which indicate that it is highly unlikely the employee would repeat the behavior.

6.2 Heads of departments and similar administrative units are authorized, upon receiving the written approval of the applicable vice president or equivalent administrator, or designee, to suspend an employee without pay for up to five working days. If the employee is exempt under the Fair Labor Standards Act, the suspension must be for a full workweek (Monday through Friday) and may not include any partial workweeks. A partial week suspension for an exempt employee will be allowed only for an infraction of a major safety rule. In situations involving employee fraud, theft or dishonesty, an exempt or nonexempt employee may be'suspended without pay for more than five working days with the approval of the CEO of the System component. The head of the department or similar administrative unit, or designee, will notify the employee in writing of the suspension without pay, the reason for the suspension and the beginning and ending dates of the suspension. The employee will be given an opportunity to respond orally when notified and/or within 24 hours in writing, and the suspension will not begin until the employee's response, if an),, has been received and considered.

6.3 An employee who is suspended without pay will be treated the same as an employee on an authorized leave without pay with respect to vacation and sick leave accrual, group insurance coverage, and other employee benefit programs during the suspension period. (See System Regulation 31.03.04.) If the employee does not return to work at the end of the suspension period or notify the supervisor of an inability to return on the specified date, the employee will be deemed to have terminated employment on that date.

6.4 If it is subsequently determined that the employee was suspended without adequate cause or that the terms of the suspension were too severe in proportion to the severity of the offense, the employee may receive back pay for all or part of the suspension period or a lesser form of discipline may be imposed if warranted. Payment for any back pay will be made through supplemental payroll procedures, and the suspension period will be reclassified as suspension With pay. Any sick leave or vacation lost or not accrued due to the leave without pay will be reinstated

6.5 Depending on the severity of the problem, temporary suspension without pay may be the appropriate disciplinary action in circumstances including, but not limited to:

(1) repetition of actions for which written reprimand(s) had been previously issued;

(2) insubordination;

(3) use of alcoholic beverages or illegal drugs or abuse of legal drugs on duty, or reporting for duty under the influence of same; or

(4) other job-related conduct or job performance that interferes with fulfilling job performance standards or the job performance of Other personnel.

6.6 An exempt or nonexempt employee who is alleged to have been involved in on-the-job violent conduct is deemed to be in violation of workplace safety rules and may be immediately suspended without pay by the employee's immediate supervisor for the purpose of

reviewing the facts with the head of the department or similar administrative unit, or designee, and determining the action to be taken. The suspension may be for the remainder of the work day during which the alleged conduct occurred and may include also the work day following the day of the occurrence. The employee must be given written notice and be allowed to respond as described in paragraph 6.2, but the suspension may begin before the written notice is prepared or the employee's response is received. The written notice should be given to the employee upon his or her return to work and 24 hours should be allowed for the employee's response.

6.7 Temporary suspension Without pay is designed to give supervisors greater flexibility in resolving problems with job-related conduct or job performance, but it is not an employee right nor a required step in the disciplinary process. The supervisor is not obligated to use suspension without pay as a form of discipline. The failure to use suspension without pay before terminating an employee is not a basis for an employee appeal of termination.

7. EXTENDED SUSPENSION WITH PAY

7.1 An employee may be suspended with pay by a System component CEO or designee for up to 30 working days because of alleged aetions that may be grounds for dismissal. Any delegation of authority under this section must be established in writing by the CEO. Extended suspension with pay will not be used as a disciplinary action. Its purpose is to allow time for completion of an investigation of the allegation and for administrative review by the head of the department or similar administrative unit, or designee. Additional time for the invrstigation beyond 30 days may

be granted only by the CEO.

7.2 Examples of alleged employee actions for which extended suspension with pay may be appropriate include, but are not limited to, allegations of suspected or reported:

(1) fraud or thet_ that may be job-related;

(2) physical assault against fellow employees, students, Clients, or visitors during working hours or on System premises;

(3) use of alcoholic beverages or illegal drugs or abuse of legal drugs while on duty, or reporting for duty under the influence of same;

(4) intentional damage or misuse of System property; or

(5) job-related violation of a criminal statute.

7.3 The head of the department or similar administrative unit, or designee, will notify the employee in writing of the suspension with pay, when the suspension will begin and the reason for the suspension. The component will notify the employee in writing of the end of the suspension or other action based on the results of the investigation. If the employee does not return to work at the end of the suspension period or notify the supervisor of an inability to return on the specified date, the employee will be deemed to have terminated employment on that date.

7.4 After the investigation, an appropriate form of

discipline may be imposed if warranted.

8. TRANSFER, DEMOTION AND/OR SALARY REDUCTION FOR DISCII_LINARY REASONS

8.1 Upon recommendation of the head of the department or similar administrative unit, or designee, the System component CEO, or designee, may transfer, demote and/or reduce the salary of an employee for disciplinary reasons because of work performance or job-related conduct that does not meet established standards.

8.2 Demotion means a change in duty assignment to a position ofiower rank. Such reduction in rank will normally be accompanied by a decrease in salary rate. Transfer means a reassignment and/or change in duty assignment to a position of similar rank.

8.3 Reduction in salary may accompany a demotion or may be implemented without a change in title or duty assignment.

8.4 The head of the department or similar administrative unit, or designee, will notify the employee in writing of the transfer, demotion and/or reduction in pay, the reasons for this action and the effective date of the action. The employee will be allowed to respond orally and/or in writing within 24 hours of receiving the notice to the person who issued the notification. The action will not become effective until the employee's response, if any, has been received and considered.

9. DISMISSAL

9.1 Heads of departments or similar administrative units

are authorized to initiate an action to dismiss an employ,ee and to set the effective date.

9.2 Dismissal action may be taken immediately atter approval by the appointing authority or designee. The employee must be notified of the dismissal, in writing. The prescribed personnel action form confirming the d smissal must be processed through administrative channels.

9.3 Generally, a minimum of two weeks' notice should be given to an employee. However, no advance notice need be given for dismissals resulting from on-the-job conduct including, but not limited to, dishonesty, insubordination, or violent or disruptive conduct, nor is advance notice required for wage employees. The employee will be given the opportunity to respond orally and/or in writing within 24 hours of receiving the notice. The dismissal will not become effective until the employee's response, if any, has been received and considered.

9.4 After a notice of termination is given; the employee must work, take accumulated leave, use earned compensatory leave or be suspended with pay through the termination date in order to be paid. Suspension with pay must be approved by the CEO or designee. Severance pay for time not worked or earned will not be authorized. A supervisor may allow the employee reasonable paid time off during this period to apply and interview for other employment.

9.5 If it is subsequently determined that the dismissal was made without adequate cause, the employee may be reinstated in the same position held at the time of dismissal and may be paid back pay to the date of the dismissal. A lesser

form of discipline may be imposed if warranted. If the employee is reinstated, benefits accruing to the employee, such as vacation and sick leave, will be reinstated to the date of dismissal.

10. RESTITUTION

The employee being disciplined oi- dismissed may be required to make restitution for damages to property or equipment, for theft, for unauthorized purchases or payment of wages, for unauthorized travel expenses, or for other illegal or improper actions. If restitution is not made under the terms and conditions mandated, the employee may be subject to legal action and/or further discipline or dismissal.

11. APPEAL OF DISCIPLINARY ACTION OR DISMISSAL

If an employee wishes to appeal any disciplinary action or dismissal from employment, the appeal must be made in accordance with the provisions of System Regulation 32.01.02.

****

CONTACT OFFICE: The System Human Resources Office

HISTORY: Last issued: November 4, 1997

SYSTEM COMPONENT RULES PERTAINING TO THIS SUBJECT:

System Administrative and General Offices:

* SAGO

Academic Institutions:

- BCD
- PVAMU
- TSU
- TAMIU
- TAMU: 32.02.02.M1 Discipline and Dismissal Procedures for Employees Other Than Faculty
- TAMU-C
- TAMUCC
- TAMU-K
- TAMU-T
- WTAMU

Agencies:

- TAES: 32.02.02.A1 Discipline and Dismissal
- TAEX
- TADCS
- TFS
- TVMDL
- TEES
- TEEX
- TTI

WEST, WEBB, ALLBRITTON, GENTRY & RIFE
A PROFESSIONAL CORPORATION

ATTORNEYS:
STEVEN ALLBRITTON

J. HANS BARCUS
GERRY BROWN
CARLTON BRYAN CANTRELL
REBECCA D. FPLEN
MICHAEL H. GENTRY*
CHRISTOPHER W. PETERSON
WAYNE T. RIFE
CARLA ROBINSON
C. SCOTT SETTLE
MARK W. SHOMAKER
ROBERT A. SWEARINGEN
JOHN C. WEBB, JR.
GAINES WEST
JULIE MAY YOUNG

1515 EMERALD PLAZA
COLLEGE STATION, TEXAS
77845-1515

TELEPHONE:(979) 694-7000
TELECOPIER: (979) 694-8000

E-MAIL:wwag@tca.net

WEBSITE:
http://www.wwaglaw.com

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COMMERCIAL REAL
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SPECIALIZATION

February 28, 2001

Honorable Steve Ogden
Texas State Senator
P. O. Box 12068
Austin, Texas 78711

Via Fax No. (512) 463-5713
and Regular Mail

RE: Mr. Michael Richards

Dear Senator Ogden:

My client, Michael Richards, was employed by

Texas A&M University for nearly thirteen (13) years until he was terminated for filing a workers' compensation claim for injuries he received on the job. I filed a lawsuit on his behalf and it is currently pending in Judge Steve Smith's 361st Judicial District Court as Cause No. 47-822. Recently, Texas A&M University, represented by the Attorney General of Texas, filed a request that my client's lawsuit be dismissed for want of jurisdiction-claiming that the State's sovereign immunity prevents the court from considering his claim. Texas A&M is alleging that Chapter 502 of the Labor Code, which contains our State's statutes dealing with A&M's workers' compensation provisions, exempts the Texas A&M University System from having to comply with the State's Anti-Retaliation Statute contained in Chapter 451 of the Labor Code.

Texas A&M's motion is currently pending before Judge Smith and he is set to rule on that motion, and review our briefs on the issue, as early as next week. Since the Bill filing deadline for this Session of the Legislature is March 9, 2001, 1 respectfully request on behalf of my client that you sponsor legislation that would allow Mr. Richards to sue the Texas A&M University System in the event my client's legal remedies are eliminated.

I have had the pleasure of working with Keyin Heybum of your office over the iast several days concerning this issue. Mr. Heybum is fully apprised of the issues in this case and of the reality that the State' s position in my client' s case effects 25,000 Texas A&M University System employees statewide. In fact, their position effects 10,000 employees in Brazes County alone. The State's position also would effect the University of Texas System which involves

Chapter 503 of the Labor Code. I have related to Mr. Heyburn that our position is that it is unconscionable to conclude that the Legislature ever intended that the Texas A&M University System and the University of Texas System could freely retaliate against its employees for filing workers' compensation claims for injuries they receive on the job. In fact this is not the law for private employers or any other state employer, including all other institutions of higher education in Texas. As incredible as this all sounds, it is the position taken by the Attorney General that Texas A&M may fire an employee for filing a workers' compensation claim and not be able to be held responsible for their retaliation.

I understand that you have an interest in looking into this issue further, however, my client needs legislation to be introduced immediately before the Bill filing deadline so that his ease can go forward in the event that his judicial remedies are eliminated. Judge Smith has announced in open court that he believes that my client has the option of pursuing legislation to waive sovereign immunity, and he apparently considers it as a viable remedy. If you would consider filing this legislation, against the Texas A&M University System, to waive the State's sovereign immunity in Mr. Richards' case, please provide me a letter indicating your intent immediately and we will work with your staff to prepare legislation to support my client's claim.

However, if you are incfined to not allow my clien't to pursue such legislation I need to have a letter from you so that I might show it to Judge Smith to demonstrate that even this avenue of relief is foreclosed for my client.

Thank you for your immediate attention to this

matter. KBTX and the Eagle are planning stories on Mr. Richards' plight.

Sincerely,

/s/ Gaines West
GAINES WEST

WEST, WEBB, ALLBRITTON, GENTRY & RIFE
A PROFESSIONAL CORPORATION

ATTORNEYS:
STEVEN ALLBRITTON

J. HANS BARCUS
GERRY BROWN
CARLTON BRYAN
CANTRELL
REBECCA D. FPLEN
MICHAEL H. GENTRY*
CHRISTOPHER W. PETERSON
WAYNE T. RIFE
CARLA ROBINSON
C. SCOTT SETTLE
MARK W. SHOMAKER
ROBERT A. SWEARINGEN
JOHN C. WEBB, JR.
GAINES WEST
JULIE MAY YOUNG

1515 EMERALD PLAZA
COLLEGE STATION, TEXAS
77845-1515

TELEPHONE:(979) 694-7000
TELECOPIER: (979) 694-8000

E-MAIL:wwag@tca.net

WEBSITE:
http://www.wwaglaw.com

*BOARD CERTIFIED
COMMERCIAL REAL
ESTATE LAW
TEXAS BOARD OF
SPECIALIZATION

February 28, 2001

Honorable Fred Brown
Texas State Representative
P. O. Box 2910
Austin, Texas 78768-2910

Via Fax No. (512) 463-5109
and Regular Mail

RE: Mr. Michael Richards

Dear Representative Brown:

My client, Michael Richards, was employed by

Texas A&M University for nearly thirteen (13) years until he was terminated for filing a workers' compensation claim for injuries he received on the job. I filed a lawsuit on his behalf and it is currently pending in Judge Steve Smith's 361st Judicial District Court as Cause No. 47-822. Recently, Texas A&M University, represented by the Attorney General of Texas, filed a request that my client's lawsuit be dismissed for want of jurisdiction-claiming that the State's sovereign immunity prevents the court from considering his claim. Texas A&M is alleging that Chapter 502 of the Labor Code, which contains our State's statutes dealing with A&M's workers' compensation provisions, exempts the Texas A&M University System from having to comply with the State's Anti-Retaliation Statute contained in Chapter 451 of the Labor Code.

Texas A&M's motion is currently pending before Judge Smith and he is set to rule on that motion, and review our briefs on the issue, as early as next week. Since the Bill filing deadline for this Session of the Legislature is March 9, 2001, 1 respectfully request on behalf of my client that you sponsor legislation that would allow Mr. Richards to sue the Texas A&M University System in the event my client's legal remedies are eliminated.

I have had the pleasure of working with Keyin Heybum of your office over the iast several days concerning this issue. Mr. Heybum is fully apprised of the issues in this case and of the reality that the State' s position in my client' s case effects 25,000 Texas A&M University System employees statewide. In fact, their position effects 10,000 employees in Brazes County alone. The State's position also would effect the University of Texas System which involves

Chapter 503 of the Labor Code. I have related to Mr. Heyburn that our position is that it is unconscionable to conclude that the Legislature ever intended that the Texas A&M University System and the University of Texas System could freely retaliate against its employees for filing workers' compensation claims for injuries they receive on the job. In fact this is not the law for private employers or any other state employer, including all other institutions of higher education in Texas. As incredible as this all sounds, it is the position taken by the Attorney General that Texas A&M may fire an employee for filing a workers' compensation claim and not be able to be held responsible for their retaliation.

I hope that you will look into this issue further. Senator Ogden has said he would not introduce legislature to help my client but would consider the larger issue of changing the law. I appreciate his concern but it won't help my client. i need legislation introduced in this Session seeking a waiver of the State's sovereign immunity foor retaliation against Mr. Richards. Will you help him?

Judge Smith has announced in open court that he believes that my client has thhe option of pursuing legislation to waive sovereign immunity, and he apparently considers it as a viable remedy. If you would consider filing this legislation, against the Texas A&M University System, to waive the State's sovereign immunity in Mr. Richards' case, please provide me a letter indicating your intent immediately and we will work with your staff to prepare legislation to support my client's claim.

However, if you are inclined to not allow my clien't to pursue such legislation I need to have a letter from you so

that I might show it to Judge Smith to demonstrate that even this avenue of relief is foreclosed for my client.

Thank you for your immediate attention to this matter. Should you have any questions about this matter, please call me at once. KBTX and the Eagle are planning stories on Mr. Richards' plight.

Sincerely,

/s/ Gaines West
GAINES WEST

APPENDIX B

CAUSE NO. 47,822-361		Filed May 2, 2001
MICHAEL RICHARDS, Plaintiff,	§ § §	IN THE DISTRICT COURT OF
V.	§ § §	BRAZOS COUNTY, TEXAS
TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY, Defendants.	§ § § § § §	361ST JUDICIAL DISTRICT

MEMORANNDUM RULING ON DEFENDANTS' MOTION TO DISMISS FOR WANT OF JURISDICTION

Michael Richards has filed suit against the Texas A&M University System ("System") and Texas A&M University ("TAMU") alleging that he was in retaliation for filing a worker's compensation claim. The Defendants dismissal of the suit, claiming that the suit is barred under the doctrine reign immunity.

The Texas Supreme Court has consistently held that sovereign bars suits against governmental entities unless there is a clear and explicit constitutional or statutory waiver of immunity. *Federal Sign v. Texas Southern Univ.*, 951

S.W.2d 401 (Tex. 1997), Only when sovereign immunity has been cleady and waived by the Legislature will Texas courts recognize the waiver. *City of LaPorte v. Barfield*, 898 S.W. 2d 288 (Tex. 1995).

The Texas Labor Code In §451,001 makes discharging or discrimination against a person who has filed a compensation claim actionable. Private sector employees have enjoyed this provision under our workers compensation laws for many years, The Labor Code provides worker's compensation coverage for state employees in the following statutes:

Section 501 - state employees, including employees of the Texas Tech System

Section 502 - employees of the Texas A&M System

Section 503 - employees of the University of Texas System

Section 504 - employees of political subdivlslons

Section 505 - employees of the Texas Department of Transportation

Sections 501.002, 504.002 and 505.002, respectively, each provide that the provisions of Section 451 apply to each governmental entity. Sections 502.002 and 503.002 (the corresponding sections regarding the A&M and IJT systems) omit Section 451 from application.

In *Fernandez v. Kerrville State Hospital*, 2000 WL 890203, the Texas Supreme Court held that sovereign immunity for those State Agencies covered under Chapter 501 of the Labor Code had been waived. In reaching its decision, the Court looked to the express language of the 1989 codification of the Anti-Retaliation Act in reaching its conclusion,

Plaintiff argues that the state has waived its immunity with respect to the System and TAMU because they are state employees and the failure of §451 coverage for them amounts to a denial of equal protection under the 14th Amendment to the U.S. Constitution and Article I, §3 of the Texas Constitution.

As to Plaintiffs first argument, §501.024 of the Labor Code expressly excludes from coverage as a "state employee" those persons employed by the A&M System who are covered by Chapter 502. There is no evidence that Plaintiff is not a person covered by Chapter 502, so Plaintiff's first argument cannot be sustained.

The Equal Protection argument is more compelling. This Court cannot comprehend why the Legislature would see fit to provide anti-retaliation coverage for certain state employees (including educational employees of the Texas tech system) while denying that same coverage to those employees of the A&M and UT systems, There is no logical basis for the distinction, However, logic is not the controlling factor in deciding constitutional issues.

Although decided prior to the Fernandez case cited above, the case of *Clark v. University of Texas Health Science Center*, 919 S.W.2d 185 (11th Dist. - 1996) is directly on point. In *Clark*, an employee of the UT system filed suit alleging retaliatory discharge for the filing of a worker's compensation claim. In deciding that the Ut system enjoyed sovereign immunity, the Eastland Court of Appeals held:

> "The legislature has the power to waive sovereign immunity or not to waive sovereign immunity for

agencies of the State. Even though the legislature has waived immunity for suits under Section 461.001 for some state employees and not for others, this does not violate the equal protection of law provisions of the U.S. CONST., amend. XIV or TEXAS CONST., art. I, §3."

While this court does have the authority to declare statutes to be in violation of federal or state constitutional provisions, it declines to do so In light of a direct appellate decision which, for the time, stands as stare decisis in our law. It remains to the legislature to provide the explanation to employees of the A&M and UT systems as to why they do not enjoy the same protections of our worker's compensation laws that other state employees do.

The Motion to Dismiss for Want of Jurisdiction is GRANTED,

Signed this 2nd day of May, 2001.

/s/ Steve Smith
STEVE SMITH
Presiding Judge

APPENDIX C

CAUSE NO. 47,822-361		Filed May 3, 2001
MICHAEL RICHARDS, Plaintiff,	§	IN THE DISTRICT COURT OF
V.	§	BRAZOS COUNTY, TEXAS
TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY, Defendants.	§	361ST JUDICIAL DISTRICT

MOTION FOR RECONSIDERATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Michael Richards (hereinafter referred to as "Plaintiff"), Plaintiff in the above ease, and files this, his Motion for Reconsideration of the Court's May 2, 2001 Order and in support, would show the following:

This Court in its order stated that there is no "logical basis" for the disparity in treatment between employees of Texas A&M and UT Systems and all other state employees. While termed as "no logical basis for the distinction," this Court clearly recognizes that there is no rational basis for the disparity. That is precisely the test for whether a statute is violative of the Equal Protection Clause -- that no rational basis exists for the disparity. *E.g., McGinnis v. Royster*, 410

U.S. 263,270, 93 S.Ct. 1055, 1059 (1973). The United States Supreme Court recently reaffirmed this well-established standard:

> Such a classification cannot ran afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.

Board of Trustees of Univ. of Ala, v. Garrett, ___U.S..___, 121 S.Ct. 955,964 (2001)(citing and quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326 (1992); *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513 (1976) (*per curiam*)).

Furthermore and significantly, the State of Texas never proffered any basis and Plaintiff negated any conceivable rational basis for the disparity.[1] The record is now complete. Therefore, as a matter of law, the statute should be declared unconstitutional. The Clark case,[2] cited by the Court and relied upon heavily by the State, did not adequately or accurately address Equal Protection. Simply put, the Eastland Court of Appeals missed the boat. Beyond that Court's conchisory language that the statute does not violate equal protection of laws provisions of the state and federal

---

[1] This Court agreed with Plaintiffin stating, "There is no logical basis for the distinction." Order of May 2, 2001 at 3.

[2] *Clark v. Univ. of Texas Health Science Center at Houston*, 919 S.W.2d 185 (Tex.App.--Eastland 1996, writ denied).

Constitutions, the Court wholly failed to conduct an equal protection analysis or even discuss arty issues germane to an equal protection analysis. Nowhere does the *Clark* Court discuss or even address what the standard is for whether a statute violates Equal Protection, nor did the Court address or state what rational basis existed for the disparate treatment. Instead the Court only discussed issues which relate to whether an individual has a protected property interest, appropriate for due process analysis, but not equal protection. Plaintiff would respectfully remind the Court that United States Supreme Court authority clearly and easily trumps that of the Eastland Court of Appeals, especially in matters of United States Constitutional import and *stare decisis* regarding the same.

The issue here is whether the statute treats similarly situated individuals differently under the law and, if so, whether the state has a rational basis for doing so. *E.g., Garrett*, 121 S.Ct. at 964.

The Court has decided the former issue and the State of Texas has failed to make any showing regarding the second. Thus, the Court should find that the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE PREMISES CONSIDERED, Plaintiff, Michael Richards, prays that this Court reconsider its May 2, 2001 Order and strike down the provisions of the Texas Labor Code which violate the Equal Protection Clause of the United States Constitution.

Respectfully submitted,
WEST, WEBB, ALLBRITTON,
GENTRY & RIFE, P.C.
By: /s/ Gaines West
Gaines West
State Bar No. 21197500
C. Scott Settle
STATE BAR NO. 24028727
1515 Emerald Plaza
College Station, Texas 77845-1515
(979) 694-7000 - Telephone
(979) 694-8000 - Facsimile

ATTORNEY FOR PLAINTIFF,
MICHAEL RICHARDS

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document has been delivered by facsimile and regular first class mail to counsel listed below on this 2nd day of March, 2001.

Shannon L. Simmons
Assistant Attorney General
Tort Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ Gaines West
Gaines West

APPENDIX D

NO. 10-01-183-CV

IN THE TENTH COURT OF APPEALS
WACO, TEXAS

MICHAEL RICHARDS,
APPELLANT

V.

TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY,
APPELLEES

Appealed from the 361st District Court
Brazos County, Texas
Cause No. 47,822-361

APPELLANT MICHAEL RICHARDS' BRIEF

WEST, WEBB, ALLBRITTON
GENTRY& RIFE, P.C.
Lanny D. Ray
Gaines West
1515 Emerald Plaza
College Station, Texas 77845
Telephone ~ (979) 694-7000
Facsimile ~ (979) 694-8000
ATTORNEYS FOR APPELLANT,
MICHAEL RICHARDS

ORAL ARGUMENT REQUESTED

NO. 10-01-183-CV

IN THE TENTH COURT OF APPEALS
WACO, TEXAS

MICHAEL RICHARDS,
APPELLANT

V.

TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY,
APPELLEES

Appealed from the 361st District Court
Brazos County, Texas
Cause No. 47,822-361

APPELLANT MICHAEL RICHARDS' BRIEF

WEST, WEBB, ALLBRITTON
GENTRY& RIFE, P.C.
Lanny D. Ray
Gaines West
1515 Emerald Plaza
College Station, Texas 77845
Telephone ~ (979) 694-7000
Facsimile ~ (979) 694-8000
ATTORNEYS FOR APPELLANT,
MICHAEL RICHARDS

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Plaintiff/Appellant

Michael Richards

Represented by:

WEST, WEBB, ALLBRITTON, GENTRY & RIFE, P.C.
Lanny Ray
Gaines West
1515 Emerald Plaza
College Station, Texas 77845

Defendants/Appellees

Texas A&M University System
Texas A&M University

Represented by:

Office of the Attorney General of Texas
Tort Litigation Division
Shannon L. Simmons
Omniah Ebeid
P.O. Box 12548
Austin, Texas 78711-2548

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ISSUE: Chapter 502 of the Texas Labor Code, which governs worker's compensation insurance coverage for employees of Texas A&M University System, violates the Equal Protection provisions of the United States Constitution and the Texas Constitution because, without any rational basis, it deprives A&M employees of the protections of the Texas Labor Code's Anti-Retaliation Law while all other similarly situated state employees have said protection 2

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STATEMENT OF THE CASE

On August 25, 1998, Appellant Michael Richards ("Richards") filed suit against Defendants Texas A&M University System and Texas A&M University (hereinafter referred to collectively as "A&M') alleging that his termination from employment with A&M was in retaliation for his filing a Texas Worker's Compensation claim. (I C.R. at 2-5).

In September of 2000, following the Texas Supreme Court decision in Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1 (Tex. 2000), which held that the legislature had waived sovereign immunity for the purposes of Chapter 451 (the Anti-Retaliation Law) of the Worker's Compensation law, A&M filed a Motion to Dismiss for Want of Jurisdiction, based on the fact that Chapter 502 of the Labor Code, which governs worker's compensation coverage for A&M, omits Chapter 451 from the list of provisions applicable to A&M. A&M argued that because Chapter 451 was not included in the provisions of worker's compensation laws applicable to A&M, there could be no anti-retaliation suit brought against A&M and therefore the Court had no jurisdiction to hear such a case. (I C.R. at 32-39).

On May 3, 2001, the Court granted A&M's Motion to Dismiss for Want of Jurisdiction, agreeing that, because the chapter goveming worker's compensation coverage for A&M employees, unlike the chapters governing coverage for other state employees, did not include Chapter 451 in the list of applicable provisions, A&M employees have no cause of action ifA&M retaliates against them for filing a worker's compensation claim. (II C.R. at 248-251). The Court disagreed with Richards that the law violated his right to Equal

Protection under the Texas and United States Constitutions. (II C.R. at 250).

Richards noticed his appeal on May 30, 2001. (II C.R. at 263).

ISSUE PRESENTED

There is but a single issue on appeal: Whether Chapter 502 of the Texas Labor Code violates the Equal Protection Provisions of the United States and Texas Constitutions because it denies A&M employees the protection of the Anti-Retaliation Law (Chapter 451) whereas all other similarly situated state employees have said protection. [1]

STATEMENT OF FACTS

Richards, a maintenance worker for A&M since 1992, suffered injury on the job in early 1998. (I C.R. at 13). As a result of Richards filing a worker's compensation claim, A&M, in retaliation for the same, terminated Richards' employment on April 3, 1998. (I C.R. at 13-14).

---

[1] Chapter 503 of the Texas Labor Code likewise omits the protections of the anti-retaliation law to University of Texas System employees. See "rEX. LAB. CODE 503.002(a)(omitting the applicability of Chapter 451). Chapter 503 was not before the trial court and is not directly at issue in the instant appeal; however, all arguments regarding Chapter 502 are equally applicable to Chapter 503.

SUMMARY OF THE ARGUMENT

The Equal Protection provisions of the United States Constitution and Texas Constitution mandate that individuals are treated equally under the law. Where similarly situated individuals are treated differently, Equal Protection requires that the difference in treatment be rationally related to a legitimate state goal.

The Texas Labor Code provisions governing worker's compensation law include an Anti-Retaliation Law that provides a right to relief to public employees who are retaliated against, inter alia, for filing a worker's compensation claim. However, this right is not afforded to public employees of Texas A&M University System; whereas, all other public employees of Texas, including those employed by other universities,[2] are provided this right under the law. Thus, similarly situated public employees of A&M are treated unequally under the law.

The State of Texas has failed to articulate what legitimate state goal is served by the unequal treatment or how the disparity is rationally related to such a goal. The trial court even stated in the order at issue, "This Court cannot comprehend why the legislature would see fit to provide anti-retaliation coverage for certain state employees (including educational employees of the Texas Tech system) while denying that same coverage to those employees of the A&M and UT systems." (II C.R. 250). The trial court went on to state, "There is no logical basis for the distinction." (Id.).

---

[2] Except those employed by University of Texas System. See note 1 *infra*.

Thus, because the public employees of A&M are unequally denied the rights bestowed by the Anti-Retaliation Law and because the State of Texas has failed to articulate how such unequal treatment is rationally related to a legitimate state goal, the statute must be stricken down insofar as it violates the Equal Protection of both the United States Constitution and the Texas Constitution.

ARGUMENT AND AUTHORITIES

Chapter 502 of the Texas Labor Code, which governs worker's compensation insurance coverage for employees of Texas A&M University System, violates the Equal Protection provisions of the United States Constitution and the Texas Constitution because, without any rational basis, it deprives A&M employees of the protections of the Texas Labor Code's Anti-Retaliation Law while all other similarly situated state employees have said protection.

A. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution mandates that a state must treat similarly situated individuals equally unless the difference in treatment is rationally related to a legitimate state goal.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall.., deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. Similarly, the Texas Constitution provides that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to

exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. ART I § 3.

To determine whether a particular statute violates Fourteenth Amendment Equal Protection, courts apply the rational basis equal protection test, which provides that similarly situated individuals must be treated equally under statutory classification unless there is "some legitimate articulated state purpose" for not doing so. *McGinnis v. Royster*, 410 U.S. 263,270, 93 S.Ct. 1055, 1059, (1973). The standard under the Texas Constitution is the virtually identical rational basis test: "[S]imilarly situated individuals must be treated equally under the statutory classification unless there is a rational basis for not doing so." *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985). The disparate treatment must be rationally related to the goal the legislature sought to achieve by enacting the legislation. *Id* The United States Supreme Court recently reaffirmed this well-established standard:

> Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.

Board of Trustees of Univ. of Ala. v. Garrett, __ U.S. _, 121 S.Ct. 955, 964 (2001)(citing and quoting *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326 (1992); *New Orleans v. Dukes*, 427 U.S: 297, 303, 96 S.Ct. 2513 (1976) (*per curiam*)).

B. Public (and private) employees in Texas have the right to bring suit against their employers for

retaliating against them for filing a worker's com pensation claim; however, A&M employees are denied the right.

The Anti-Retaliation Law of the Texas Labor Code prevents an employer from discharging or discriminating against an employee for filing a worker's compensation claim in good faith or hiring legal representation in such a claim. TEX. LAB. CODE § 451.001. The Texas Supreme Court, in *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1 (Tex. 2000), held that sovereign immunity was waived for purposes of the Anti-Retaliation Law and state employees could bring suit against state agencies under the Anti-Retaliation Law of Chapter 451 of the Texas Labor Code. The Court based its conclusion in part upon the language of Section 501.002 of the Texas Labor Code (formerly Section 15b of the 1989 State Applications Act) which expressly references the Anti-Retaliation Law (Chapter 451) and states, "For the purposes of this chapter and Chapter 451, the individual state agency shall be considered the employer." TEX. LAB. CODE 501 .O02(b); *see Kerrville*, 28 S.W.3d at 1.

Chapter 501, governs worker's compensation coverage for state employees, including employees of the Texas Tech University System, and Section 501.002(a), which provides for applicability of laws, expressly includes Chapter 451 among those applicable. TEX. LAB. CODE 501.002(a)(10). Likewise, Chapter 504 (governing employees of political subdivisions) and Chapter 505 (gov-eming employees of the Department of Transportation) also include Chapter 451 among the list of applicable worker's compensation laws. Id. § 504.002(a)(7); § 505.002(a)(10).

Although most state employees fall within the purview of Chapter 501 or 504, those working for A&M and the University of Texas System ("LIT"), however, do not. Worker's compensation for A&M employees is govemed by Chapter 502 and by Chapter 503 for UT employees. Id. §§502.001 - 502.070; §§503.001 - 503.071. Chapters 502 and 503 do not include Chapter 451 (the Anti-Retaliation Law) among the list of applicable worker's compensation laws. See TEX. LAB. CODE §502.002; §503.002.

The State argued, and the trial court agreed, that by not including Chapter 451 within the applicable provisions of Chapters 502 and 503, the legislature did not intend to waive sovereign immunity as to A&M and UT and thus a retaliated-against employee of A&M or UT has no cause of action against his employer. (II C.R. 248-249).

Thus, all public employees, as well as private employees, TEX. LAB. CODE §§401.012, 451.001, except those working for A&M and LIT, have a legal remedy when their employer retaliates against them for making a worker's compensation claim. All other employees, notably including employees of Texas Tech University, University of North Texas, and Southwest Texas State University, have the protection of the Anti-Retaliation Law. A&M and UT employees do not and, as similarly situated individuals, being treated unequally by the worker's compensation laws of Texas.

C. Nowhere in the record is there a trace of any rational basis or legitimate purpose for the unequal treatment of A&M employees.

Given that similarly situated individuals are being

treated unequally by the law, it falls upon the State to articulate a legitimate state goal and show that the disparity in treatmen is rationally related to that goal. *Garrett*,__ U.S. at__ 121 S.Ct. at 964; *Whitworth*, 699 S.W.2d at 197.

Nowhere in the record is there the slightest mention of the legitimate state goal being furthered by the unequal treatment of A&M and UT employees. The trial court in its order of dismissal confirms the lack of any articulated purpose, stating, "This Court cannot comprehend why the legislature would see fit to provide anti-retaliation coverage for certain state employees (including educational employees of the Texas Tech system) while denying that same coverage to those employees of the A&M and UT systems." (II C.R. 250). The trial court went on to state that there is no "logical basis" for the disparity in treatment between employees of Texas A&M and UT Systems and all other state employees. (Id.). The semantics of"logical" versus "rational" aside, "no logical basis for the distinction" is precisely the test for whether a statute is violative of the Equal Protection Clause -- that no rational basis exists for the disparity. *E.g., McGinnis v. Royster,* 410 U.S. 263,270, 93 S.Ct. 1055, 1059 (1973).

Regardless, it was incumbent upon the State to articulate a legitimate goal for the unequal treatment and demonstrate the rational relation between the unequal treatment and that goal. The State failed to do so.

CONCLUSION

Given that Section 502.002 of the Labor Code purports to exempt A&M from the Anti-Retaliation Law for workers' compensation, such section thereby treats similarly

situated individuals differently, and given that there is no rational basis for doing so, and particularly given that the State has not even proffered one, the exemption of A&M and UT from Chapter 451 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Texas Constitution.

PRAYER

WHEREFORE PREMISES CONSIDERED, Michael Richards respectfully requests that this Court reverse the trial court and strike down the provisions of the Texas Labor Code which violate the Equal Protection provisions of the United States and Texas Constitutions.

Respectfully submitted,
WEST, WEBB, ALLBRITTON,
GENTRY &; RIFE, P.C.
1515 Emerald Plaza
College Station, TX 77845
Telephone - (979) 694-7000
Facsimile - (979) 694-8000

By: /s/ Gaines West
Lanny D. Ray
State Bar Number 24000027
GAINES WEST
State Bar Number 21197500

ATTORNEYS FOR APPELLANT,
MICHAEL RICHARDS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document, Brief of Appellant Michael Richards, has been delivered by certified mail, return receipt requested, to counsel listed below on this 20th day of July, 2001.

Shannon L. Simmons
Assistant Attorney General
Tort Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ Gaines West
GAINES WEST